

Can citizen suits help China battle pollution?

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Rapid economic growth in China has caused serious ecological problems. In January 2013, Beijing, China experienced what some termed an "Airpocalypse." Monitoring stations recorded particulate matter 40 times higher than guideline levels set by the World Health Organization. Recent reports estimate that a million people a year in China die prematurely due to air pollution, and that more than 70 percent of China's groundwater is polluted. China also is the world's largest emitter of carbon dioxide, the primary greenhouse gas caused by human activities.

These dire environmental problems, and the accompanying public outcry, have spurred reforms to China's environmental policies. The Chinese government has adopted numerous new anti-pollution laws and expanded the authority of its Ministry for Environmental Protection. In 2012, the Chinese Communist Party added the environment to its four basic "platforms."

China's efforts include new laws that may allow its citizens and non-governmental organizations (NGOs) to enforce environmental laws in Chinese courts. The potential emergence of public interest environmental citizen suits in China, a country with a tightly controlled political system, is a noteworthy and potentially critical reform.

Citizen suits are lawsuits filed by a private citizen or NGO to enforce a statute. In the U.S., environmental laws including the federal Clean Air Act and Clean Water Act expressly permit citizen suits. Citizen suits are distinct from tort suits that seek monetary compensation for personal injury or property damage. Instead, citizen suit plaintiffs typically seek injunctive relief. Citizen suits can be filed against the government, and thus are an important way to keep government accountable. Citizen suits are the product of a "deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that [environmental laws] would be implemented and enforced." *Natural Res. Def. Council v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974). Citizen suits also may



Chinese cycle through smog and pollution over Beijing's Tiananmen Square, May 1, 2008.

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allow the court to award attorney fees to successful plaintiffs.

The concept of citizen environmental enforcement is fairly new in most countries, and China is no different. China has a statute-oriented judicial system with civil cases governed by the Chinese Civil Procedure Code. Special environmental trial courts first appeared in Guizhou Province in 2007, and now exist in many parts of China. Most environmental cases, however, concern money damages or contested mineral rights. Very few are suits filed by Chinese citizens or NGOs in the public interest against the Chinese government or private entities for injunctive compliance with environmental laws. In fact, the Chinese environmental courts are so underutilized that many assigned judges have returned to their original, busier divisions.

Recognizing the role that citizen enforcement (and lawyers) can have in environmental protection, recent changes to Chinese law may foster public interest environmental citizen suits. In 2012, the National People's Congress (NPC) (China's national legislature) amended Article 55 of the Civil Procedure Law to permit "agencies and relevant organizations" to bring court actions where the "environ-

ment is polluted ... or other acts impairing the public interests are committed...."

Unfortunately, amended Article 55 has not opened Chinese courts to environmental citizen suits as some hoped because the article does not define rules that govern standing to file such suits. The lack of clear standing rules has allowed local environmental

plaintiff suffer a concrete "injury in fact," which is not "hypothetical." Next, there must be a causal connection between the injury and the conduct complained of. Finally, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." Under these rules, health, recreational or aesthetic interests suffice to

for environmental citizen suits, adding Article 48 to provide that "the All-China Environment Federation [ACEF] ... may file a suit to the people's court against actions concerning environmental pollution, ecological damage and damage to the public interest." The NPC indicated that limiting standing to ACEF, a partially government-funded organization established by the Ministry for Environmental Protection, was appropriate because otherwise lawsuits by numerous organizations could overwhelm the environmental courts.

Many commentators strongly criticized the proposal as an attempt to monopolize environmental citizen suits by vesting authority to file such cases solely in an organization — ACEF — closely tied to the Chinese government. This raised the specter of political influence over the environmental citizen suit process, which could render the reform ineffectual.

In response, in October 2013 the NPC published a Third Draft Bill of the Environmental Protection Law. Proposed Article 48 was amended to broaden standing requirements to allow citizen suits by "national social organizations specializing in environmental and welfare activities for five consecutive

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courts in China to impose their own standing requirements, which resulted in the rejection of almost all of the cases for reasons such as "lack of standing" or that "plaintiffs seem unqualified to file the case."

By way of contrast, American environmental laws are governed by the well-established, relatively broad standing rules of Article III of the Constitution. As set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), federal courts require that the

demonstrate standing in environmental cases, and a NGO has standing so long as the suit is germane to the organization's mission and one of its members has individual standing under Article III.

In June 2013, the Chinese NPC attempted to address the confusion caused by the lack of standing rules under Chinese law. In its Second Draft Bill to the Chinese Environmental Protection Law, the NPC proposed to clarify standing requirements

years or more, reputable and legally registered..." The broader language in the Third Draft Bill is a notable example of the Chinese government's growing responsiveness, at least on paper, to citizen demands for increased transparency and environmental enforcement.

Nevertheless, despite the broader language, Article 48 as proposed would probably substantially limit the number of organizations eligible to file citizen suits, since most Chinese environmental organizations are only locally registered. Limiting standing to only "national organizations" could potentially disqualify all but a handful of environmental NGOs, as well as all individual plaintiffs. This would be far more restrictive than the American Article III standing rules. Moreover, there is no proposal to allow environmental public interest plaintiffs to recover attorney fees, and this may severely hinder the ability to prosecute such cases in Chinese courts.

Proposed Article 48 to China's Environmental Protection Law remains pending at the NPC's Standing Committee that must approve the legislation before it can be considered at the annual session of the full NPC, set for March 5, 2014. If adopted by the NPC, the legislation then requires the approval of Chinese President Xi Jinping.

For now, citizen suit standing in Chinese environmental courts remains a work in progress. While the end result is not clear, it is worthy of close attention in 2014 and beyond. Whether environmental public interest litigation develops in China will be an important measure of the Chinese government's willingness to foster the rule of law through robust citizen access to the courts. It also will be a key step on China's path to environmental sustainability. In this increasingly interdependent world, this is crucial not just for the 1.3 billion Chinese people, but for all of us.

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